

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of	)	
	)	
Review of the Emergency Alert System	)	EB Docket No. 04-296
	)	
To: The Commission		

**PETITION FOR PARTIAL RECONSIDERATION OF PANAMSAT  
CORPORATION, SES AMERICOM, INC., AND INTELSAT, LTD.**

December 27, 2005

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<sup>4</sup> R&O, ¶ 6.

the system will be activated at the national level, and has delegated this authority to the director of FEMA.<sup>5</sup>

National activation of the EAS for a Presidential message “is designed to provide the President the capability to transmit within ten minutes from any location at any time, and must take priority over any other message and preempt other messages in progress.”<sup>6</sup> Upon national activation, broadcast stations and cable systems that are subject to the EAS rules “must cease their normal broadcasting and transmit such a Presidential message.”<sup>7</sup>

In the R&O, the Commission extended EAS requirements, which had been limited to analog broadcast stations and analog cable systems, to other distribution systems. In particular, the Commission applied its EAS requirements for the first time to digital television and radio, digital cable, and satellite television and radio.

Petitioners applaud the Commission’s action. In an emergency, getting timely information to the public can be a matter of life and death. PanAmSat, SES Americom, and Intelsat know this first hand, having provided satellite capacity that was used as a substitute for terrestrial communications systems rendered inoperable by Hurricane Katrina, Hurricane Rita, and Hurricane Wilma. The Commission’s actions in this proceeding will enhance the safety and well being of the populace by affording improved access to public alerts and warnings.

This Petition focuses exclusively on direct-to-home (“DTH”) services that program distributors transmit on Ku-band frequencies via fixed satellite service (“FSS”)

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<sup>5</sup> R&O, ¶ 6.

<sup>6</sup> R&O, ¶ 8.

<sup>7</sup> R&O, ¶ 8. Using the EAS to transmit state or local emergency information, on the other hand, is voluntary. *Id.*

satellites. In the case of such services, the Commission decided in the R&O to apply the EAS requirements to FSS satellite operators, but to permit the operators to delegate their responsibilities to the DTH program distributors and to rely on certifications from the program distributors that the EAS requirements were being satisfied.<sup>8</sup> Petitioners support the application of the EAS requirements to DTH-FSS services, but seek reconsideration of three aspects of the Commission's decision.

First, the EAS requirements should apply to the DTH-FSS program distributor, not the FSS satellite operator. The Commission has the statutory authority to apply these rules directly to the DTH program distributor, and there is no benefit to instead reaching these distributors indirectly through their satellite space segment vendors. The Commission's approach in the new rules makes for less effective enforcement, and imposes substantial burdens on satellite operators. Shifting EAS responsibility directly to the DTH program distributor would alleviate these burdens and would harmonize the Commission's FSS-DTH approach with the approach the Commission has taken with respect to other program services.<sup>9</sup>

Second, in the event that the EAS requirements continue to apply to FSS satellite operators providing capacity to DTH program distributors, Petitioners request that the Commission grandfather contracts that already are in place when the new EAS rules become effective. If an FSS operator, prior to the effective date, entered into an agreement to sell or lease satellite capacity to a DTH program distributor, the FSS

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<sup>8</sup> R&O, ¶ 49 & n. 152. Only DTH-FSS services exceeding the minimum channel threshold established by Section 25.701(e) of the Commission's rules are subject to EAS requirements. *Id.* ¶ 49.

<sup>9</sup> Although DTH-FSS services typically are provided by independent program distributors, the rule revision proposed by Petitioners would reach the FSS operator in cases in which the FSS operator may itself serve as the DTH program distributor.

operator lacks the ability to require the program distributor to comply with the EAS requirements and to require it to provide certifications to that effect. The Commission should expressly provide that the rules do not apply to FSS space segment sold to third parties prior to the effective date of the new rules.

Finally, Petitioners request that the Commission provide an exemption from the EAS requirements for DTH-FSS services that are directed primarily to consumers outside the United States but also are made available to consumers in the United States. It is highly improbable that the distributors of these services would be willing to preempt normal programming for announcements from the President of the United States. If the EAS requirements apply to these services, therefore, distributors will not market the services to U.S. consumers and the American public will be deprived of access to valuable programming.

**II. THE EAS REQUIREMENTS SHOULD NOT APPLY TO FSS OPERATORS SELLING OR LEASING SATELLITE CAPACITY TO DTH PROGRAM DISTRIBUTORS.**

**A. EAS Rules For Other Services Apply to the Entity That Delivers Programming to the Consumer.**

In all cases but one, the new EAS requirements, like the EAS requirements that were already in effect, apply to the entity that delivers programming to the consumer and therefore is in a position to substitute emergency messages when the EAS system is activated. In the case of broadcast services, for example, the requirements apply to the stations that transmit programming to consumers' radio and television receivers. In the case of cable services, the requirements apply to the cable system operators that provide programming, via their cable distribution networks, to subscribers. In the case of direct

broadcast satellite (“DBS”) services, the requirements apply to the companies that provide programming, via their DBS satellites, to subscribers.

For reasons that are not explained in the R&O, however, the Commission departed from this approach in the case of DTH-FSS services. In the R&O, the Commission elected to apply the EAS requirements to the FSS satellite operator rather than to the DTH-FSS program distributor. For multiple reasons, Petitioners seek reconsideration of this decision.

**B. Applying EAS Requirements to FSS Satellite Operators Offers No Benefits, Presents Enforcement Issues, And Imposes Significant Burdens.**

When an FSS satellite operator sells or leases capacity to a DTH program distributor, the satellite operator has no relationship with the subscriber and has no control over program content. Consequently, the satellite operator is incapable of distributing EAS messages to DTH subscribers. More fundamentally, the FSS operator’s contract with its customer often will not even address whether or not the space segment is to be used for DTH service, especially in long term space segment arrangements. Customers have substantial freedom as to how they use the space segment they acquire. For that matter, the customer may resell the capacity to a third party, which itself may or may not provide DTH service.

There is no benefit, therefore, in applying the EAS requirements to the satellite operator. The only role that the operator can play is to pass through to the DTH program

distributor, via contract, requirements that the Commission could have - and should have - applied directly to the program distributor.<sup>10</sup>

The Commission's indirect approach, moreover, presents enforcement issues. In the R&O, the Commission stated that "[i]f a satellite licensee has reason to believe that its customer-program distributor is not complying with these [EAS] rules or has falsely certified compliance, the licensee should report the situation to the Commission for appropriate action."<sup>11</sup> There is no "appropriate action" that the Commission could take in these circumstances, however, because at present the program distributor has no obligation under the Commission's rules to comply with the EAS requirements.

Although there is no benefit to - and there are enforcement problems with - the indirect approach that the Commission has taken, the approach clearly imposes significant burdens. Under this approach:

- The satellite operator must negotiate with the DTH program distributor, which is a customer of the satellite operator, concerning compliance with the EAS requirements and compliance certifications. It must do so in the

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<sup>10</sup> Petitioners recognize that seven years ago the Commission decided to apply the DBS public service requirements that are codified in Section 25.701 of the Commission's rules to the FSS satellite operator rather than to the FSS-DTH program distributor. *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations, Report and Order*, 13 FCC Rcd 23254 (1998) ("First Report and Order"). *See also* Memorandum Opinion and Order on Reconsideration of the First Report And Order, FCC 03-78 (March 25, 2004); Second Order on Reconsideration of First Report and Order, FCC 04-44 (March 25, 2004). The Commission did so, however, because it believed that the Congress, in Section 335 of the Communications Act, had required that result. First Report and Order, ¶¶ 18-26. (As the Commission is aware, based on the parties' filings at the time, FSS operators generally had a different view of Section 335.) In the case of the EAS rules, there is no Congressional directive concerning FSS-DTH services, so the Commission is free to implement the EAS requirements in the manner it sees fit.

<sup>11</sup> R&O, n. 152.



context of contractual discussions in which seeking a provision in one area may necessitate granting a concession in another.

- If disputes arise concerning whether the EAS provisions in the contract have been satisfied, the satellite operator may become embroiled in litigation.
- The satellite operator must monitor whether it has received the certifications that program distributors have agreed to provide, and if it has not, the satellite operator must take action to ensure that the certifications are made available.
- If the program distributor is not complying with its contractual commitment to observe the EAS requirements, the satellite operator may have to sue for specific performance.
- If questions arise concerning the meaning of the EAS rules or the need for certifications, the satellite operator's counsel must be brought in to provide an explanation.

By any measure, these burdens – none of which would exist if the Commission were to regulate the DTH program distributor directly - are substantial.

In the R&O, the Commission recognized that it is problematic for someone other than the program distributor to have to comply with the EAS requirements. The Commission declined to apply the EAS requirements to providers of home satellite dish (“HSD”) services, finding that it would be “very burdensome” for HSD service providers

to distribute EAS messages to HSD subscribers because “HSD users receive programming directly from programmers.”<sup>12</sup>

HSD service providers and FSS satellite operators, however, face analogous circumstances. HSD service providers do not provide programming to subscribers; the programmers do that directly. FSS satellite operators similarly do not provide program to subscribers; the DTH program distributors do that directly. If it is “very burdensome” for HSD service providers to distribute EAS messages, therefore, it is “very burdensome” for FSS operators to do the same. There is no reason for the Commission to treat two such similarly situated parties differently.

While there is no benefit to imposing the EAS requirements on the FSS satellite operators, there is a significant benefit to imposing them on the DTH program distributors. As explained in Section III of this petition, FSS operators have no means for enforcing the EAS requirements against customers that already have contracted for their capacity. In light of the fact that much of Petitioners’ Ku-band capacity is under long term contract, as a practical matter it will be years before this capacity will be subject to EAS requirements as long as the EAS rules apply to FSS operators. If the EAS rules were to apply directly DTH-FSS program distributors, on the other hand, the rules could be implemented at once, thus better serving the public interest in ensuring that viewers are informed of emergency situations.

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<sup>12</sup> R&O, ¶ 58. The Commission also relied on the fact that there is a limited number of HSD users. *Id.* For different reasons, the Commission decided not to apply the EAS requirements to HSD programmers, either. *See id.* at n. 190.

In short, applying the EAS requirements to DTH-FSS program distributors directly would be all upside and no downside. This change would harmonize the Commission's EAS requirements, making the entity that delivers programming to the consumer responsible for EAS compliance in all cases. The change would not detract from EAS compliance, because there is no benefit to applying EAS requirements to FSS satellite operators that are incapable of distributing EAS messages to DTH subscribers. The change also would enable the Commission to enforce its EAS requirements more effectively, and would relieve FSS operators of burdens that, in the analogous context of HSD services, the Commission has found to be substantial. And the change would expedite the applicability of EAS requirements to FSS capacity that is under long term contract. For all of these reasons, on reconsideration the Commission should shift the responsibility for complying with the EAS requirements from the FSS satellite operator to the DTH-FSS program distributor.

**C. The Commission Can Regulate  
DTH-FSS Program Distributors Directly.**

At one time, FCC licenses were required to operate receive-only earth stations that are used to communicate with FSS satellites. Over the years the Commission has eliminated this requirement for most categories of receive-only earth stations.<sup>13</sup> A license continues to be required, however, for receive-only earth stations communicating with FSS satellites that are licensed outside the United States and are not on the Commission's Permitted Space Station List.<sup>14</sup>

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<sup>13</sup> See, e.g., *Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 FCC 2d 205 (1979); *Deregulation of Domestic Receive-Only Satellite Earth Stations*, 104 FCC 2d 348 (1986); Public Notice, *New Rules for Part 25 - Satellite Communications*, Report No. DS-1097, 6 FCC Rcd 3738 (1991).

<sup>14</sup> See 47 C.F.R. § 25.131(j).

Petitioners believe that the Commission already has jurisdiction over DTH-FSS program distributors for EAS purposes by virtue of the fact that the program distributors use radio stations (*i.e.*, receive-only earth stations) to serve their subscribers. Should the Commission deem this fact to be insufficient for jurisdictional purposes, however, it could establish jurisdiction over the program distributors conclusively by making minor revisions to its rules. In particular, the Commission could reinstate for DTH-FSS services the requirement that licenses be obtained for receive-only earth stations. It then could require that such licenses be obtained by the DTH-FSS program distributors; issue a blanket license covering all DTH-FSS program distributors, present and future; and condition the blanket license on compliance with the Commission's EAS rules. The program distributors then would be directly responsible to the Commission for EAS compliance.

### **III. THE COMMISSION SHOULD GRANDFATHER EXISTING CONTRACTS.**

If the Commission on reconsideration decides to retain application of EAS requirements to FSS operators, then it should grandfather existing contracts. Contracts for the sale or lease of satellite capacity are the only vehicle available to FSS satellite operators for requiring program distributors to transmit EAS messages at the requisite times and to provide compliance certifications. If the Commission does not shift the responsibility for EAS compliance in the case of DTH-FSS services from the satellite operator to the program distributor, then on a going forward basis FSS satellite operators can seek to include appropriate EAS language in their capacity agreements. The FSS satellite operators have no means, however, of requiring EAS compliance in connection with capacity agreements that were entered into prior to the effective date of the R&O.

At a minimum, therefore, the Commission should grandfather such agreements.<sup>15</sup> The Commission should expressly provide that the new rules do not apply to FSS satellite space segment sold prior to the effective date of those rules.

**IV. THE COMMISSION SHOULD PROVIDE AN EXEMPTION FOR DTH-FSS SERVICES THAT ARE DIRECTED PRIMARILY TO CONSUMERS OUTSIDE THE UNITED STATES.**

Read literally, the rules adopted in the R&O would make a DTH-FSS service subject to the EAS rules if the service were provided to as few as one U.S. subscriber. Thus, a DTH-FSS service that is marketed primarily to customers outside the United States, but that is made available to U.S. subscribers on a “spillover” basis, would be required to comply with the EAS rules no matter how small a percent of the service’s audience was made up of U.S. customers.

The Commission should reconsider its FSS rules to the extent that they apply to the use of FSS satellites to provide DTH services primarily in foreign countries.<sup>16</sup> It is highly improbable that the distributors of these services would be willing to preempt normal programming for announcements from the President of the United States. If the EAS requirements apply to these services, therefore, distributors will not market the services to U.S. consumers and the American public will be deprived of access to valuable programming.

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<sup>15</sup> In most cases, capacity agreements have provisions requiring the customers of FSS satellite operators to comply with applicable law. These applicable law provisions, however, do not ensure that DTH program distributors with pre-existing contracts will comply with EAS requirements. Under the rules adopted in the R&O, there are no EAS requirements for DTH-FSS program distributors. If a DTH-FSS program distributor does not transmit an EAS message during an emergency, therefore, it is not, by virtue of that failure, violating a contractual obligation to comply with applicable law.

<sup>16</sup> Petitioners suggest that the Commission employ a standard of 50% of the area or population within a footprint for determining whether the primary audience for a DTH service is outside the United States. In virtually all cases the primary audience will be immediately obvious, because the signal will be focused principally either on CONUS or on non-U.S. territories.

As a matter of international comity, moreover, the Commission should respect the sovereignty of neighboring countries when developing rules and policies concerning services that inherently have international implications. Thus, where the audience that a DTH service is directed to resides primarily in a foreign country, the Commission should avoid regulating the content of the programming that the distributor provides. Acting otherwise would call into question the U.S. commitment to free flow of information across international borders. The U.S. long has opposed the attempts of other countries to block U.S. programming at their borders based on content restrictions. For similar reasons, the U.S. should open its borders to non-U.S. programming without imposing content restrictions.

## **CONCLUSION**

In view of the foregoing, the Commission should:

- (1) shift the responsibility for compliance with the EAS rules with respect to FSS-DTH services from the FSS satellite operator to the DTH program distributor;
- (2) grandfather FSS capacity agreements that already are in place on the effective date of the new EAS rules, if responsibility for compliance with the EAS rules is not shifted to the DTH program distributor; and
- (3) establish an exception to the EAS rules for DTH-FSS services that are directed primarily to consumers outside the United States.

Respectfully submitted,

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